STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GLENDALE CITY EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF GLENDALE, Respondent.	Case No. LA-CE-672-M PERB Decision No. 2251-M April 18, 2012

Appearances: City Employees Associates by Jeffrey W. Natke, Labor Representative, for Glendale City Employees Association; Liebert, Cassidy & Whitmore by Adrianna E. Guzman, Attorney, for City of Glendale.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Glendale City Employees Association (Association) of the PERB Office of the General Counsel's dismissal (attached) of its unfair practice charge. The charge alleged that the City of Glendale (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by refusing to meet and confer in good faith during negotiations for a successor memorandum of understanding. The charge alleged that this conduct constituted a violation of MMBA sections 3500, 3504, 3505 and 3505.2.[2] The Board agent dismissed the charge finding that it failed to state a prima facie case.

[1] MMBA is codified at Government Code section 3500 et seq.

[2] PERB Regulation 32603, subdivision (c) includes as an MMBA employer unfair practice a refusal or failure to meet and confer in good faith with an exclusive representative as required by MMBA section 3505. (PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.)

The Board has reviewed the entire record in this matter and given full consideration to the issues raised on appeal and the arguments of the parties. Based on that review and consideration, the Board finds the Board agent's warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.[3]

The Association alleges, for the first time on appeal, that the City's bargaining conduct was retaliatory, and involved strategies of intimidation and threats of reprisals intended to extract concessions from the Association. PERB Regulation 32635, subdivision (b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." There is no demonstration of good cause to consider these new allegations on appeal, and therefore the Board declines to do so.[4]

[3] By this decision, we hereby correct a statement in the fourth paragraph on page four of the warning letter regarding the second described term of the City's initial offer. The charge alleged that the City proposed **an** (rather than "no") additional three lower steps. We also correct a statement in the first paragraph on page three of the dismissal letter. The charge alleged that the parties met on October 6, 2010, to discuss impasse resolution procedures, but ultimately the City rejected the Association's mediation proposal and no further negotiations concerning impasse resolution occurred. These corrections do not disturb the Board agent's thorough analysis of the issues; they are made for clarification purposes only and are not material to the outcome of this matter.

[4] Even if we determined that a claim of discrimination/retaliation can be read into the charge, the Association's allegation that it was treated differently than the other bargaining units (fire, police and management) in its negotiations with the City is not sufficient, in and of itself, to set forth a prima facie case. (See *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 [discrimination found where differential treatment between two groups of employees was predicated on one group's participation in protected activity].)

ORDER

The unfair practice charge in Case No. LA-CE-672-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2806
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August 30, 2011

Jeffrey Natke, Labor Representative
Glendale City Employees Association
2918 East 7th Street
Long Beach, CA 90804

Re: *Glendale City Employees Association v. City of Glendale*
Unfair Practice Charge No. LA-CE-672-M
DISMISSAL LETTER

Dear Mr. Natke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 14, 2011 and amended on June 30, 2011 (First Amended Charge). The Glendale City Employees Association (GCEA or Charging Party) alleges that the City of Glendale (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act) and PERB Regulation 32603 by: (1) engaging in surface bargaining; and (2) bargaining to impasse a non-mandatory subject of bargaining.[1]

Charging Party was informed in the attached Warning Letter dated May 26, 2011 (Warning Letter), that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 9, 2011, the charge would be dismissed. At Charging Party's request, the deadline to file an amended charge was extended to June 30, 2011. On June 30, 2011, this office received a First Amended Charge.

Relevant Facts

The City and GCEA had an agreement on cost-sharing for the employer portion of Public Employees' Retirement System (PERS), which survived the Memorandum of Understanding (MOU) that expired on June 30, 2010. Article 2, Section E of the MOU provides that the cost-sharing agreement shall last through July 1, 2016. Pursuant to this agreement, the City pays the full amount of the employer rates between 0 and 7%. If the employer rate exceeds 7%, a 50/50 cost sharing arrangement applies. In such case, the City and unit employees would split evenly increases beyond 7%, until the employees' contribution to the employer rates hit a cap

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

of 0.5%. For example, if the employer rate increases to 8%, the City would pay 7.5%, and the employee would pay 0.5% of the employer rate and the full employee rate. If the employer rate exceeded 16%, a straight 50/50 cost sharing would apply, with no cap, for the increases beyond 16%.

Between March 2010 and September 2010, the parties were meeting and conferring over a successor MOU. During an April 29, 2010 meeting, the City wanted to discuss PERS cost sharing as an alternative to layoffs. The City's Director of Human Resources Matt Doyle expressed that there was public sentiment regarding retirement costs, and noted that a two-tier retirement system was a "huge issue" for the City Council. He also noted that while a two-tier retirement system would not solve the immediate budget issue, it would make a difference long-term. The City proposed that the employees pay 100% of the cost for medical insurance premium increases. GCEA rejected that proposal. GCEA proposed furloughs as an alternative, however the City stated it opposed cutting services.

On July 19, 2010, the City proposed that the cost sharing provisions for the employer portion of the PERS contribution increase from 0.5% to 2.0%, or in the alternative, that the GCEA make concessions for a 1.5% salary decrease. The City explained that since, in the event of impasse, the City could not impose cost sharing on the employer portion of PERS, the City needed to include this option of reducing salaries "to achieve the desired costs savings." On August 18, 2010, GCEA made a counterproposal that included an offer that employees pay 0.75% of the City's portion of PERS instead of the City's proposed 2.0%.

On August 25, 2010, the City provided GCEA with a "Conditional Last, Best Final Meet and Confer Proposal" (Conditional LBFO) which proposed the following relevant terms:

> 7. **PERS Retirement Cost Sharing:** Increase current cost-sharing provisions for the employer portion of the PERS contribution from 0.5% to 2.0%. In the event that this Last, Best and Final proposal does not result in a ratified agreement, the City shall seek implementation of a 1.5% base salary decrease in lieu of the increased PERS cost-sharing, and this alternate proposal shall be considered incorporated into the City's written proposal of July 19, 2010.
>
> 16. **Duration of Time to Enter into Agreement:** This Conditional Last, Best and Final Offer shall remain valid through and including August 31, 2010. . . . In the event that this Conditional Last, Best and Final Offer is either not ratified by the [GCEA] or if timely ratification notice is not provided, the Conditional Last, Best and Final Offer shall be concurrently amended by reversion to the written City proposal dated July 19, 2010, which shall itself become the Last, Best and Final City Offer.

GCEA rejected the Conditional LBFO, and on September 21, 2010, the City declared impasse. The parties engaged in mediation in October 2010, but were unsuccessful in reaching an agreement for a successor MOU. On November 2, 2010, the City Council adopted a resolution implementing terms from the City's July 19, 2010 proposal which included a 1.5% reduction in employee salaries.

Discussion

In the Warning Letter, Charging Party was advised that the charge fails to allege sufficient facts to demonstrate that the City engaged in surface bargaining. Charging Party was further advised that although there are facts showing the City engaged in regressive bargaining (i.e., by including terms in its July 19, 2010 LBFO that were less favorable than the August 25, 2010 Conditional LBFO), one indicia of surface bargaining alone does not establish a prima facie case of surface bargaining in violation of the MMBA. (See, e.g., *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.)

The amended charge re-alleges that the City engaged in surface bargaining by adopting a "take-it-or-leave-it" approach during pre-impasse bargaining.[2] The amended charge also alleges a new legal theory that the City engaged in a "per se" violation of the duty to bargaining in good faith on the grounds that the City negotiated to impasse a permissive subject of bargaining. As discussed below, these allegations fail to demonstrate a prima facie case.

I. "Take-it-or-Leave-it" Bargaining

Charging Party asserts that "from 'day one' of the negotiations. . ..., the City had adopted a 'take-it-or-leave-it' on cost sharing for the employer's PERS rate" and that the "City was adamant that GCEA must open up the cost sharing arrangement and agree to pay an additional 1.5% of the employer rate."

In the Warning Letter, Charging Party was advised that entering negotiations with a "take-it-or-leave" attitude demonstrates an indicia of surface bargaining under the totality of the conduct test. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.)

However, the duty to bargain does not compel either party to make concessions. Insistence on a firm position is not necessarily evidence of bad faith because the law merely requires the parties to maintain a sincere interest in reaching an agreement, and even if the reasons for insisting on a particular position or contract term are questionable, if the belief is sincerely

[2] The amended charge fails to: (1) re-assert the allegation that the City engaged in surface bargaining during the impasse resolution procedure; and (2) provide new facts to cure the deficiencies addressed in the Warning Letter for such allegation. Therefore, as discussed in the Warning letter, this allegation fails to demonstrate that the City engaged in surface bargaining during and prior to exhaustion of impasse.

held, it may be maintained even if it produces a stalemate. (See *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 805-806; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 22-23; *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 4, n.3; *Trustees of the California State University* (2006) PERB Decision No. 1842-H; *City of Fresno* (2006) PERB Decision No. 1841-M; *County of Riverside* (2004) PERB Decision No. 1715-M; *Oakland Unified School District* (1982) PERB Decision No. 275.) The obligation to bargain in good faith merely requires the parties to explain the reasons for a particular bargaining position with sufficient detail to "permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133.)

In the context of this record, it cannot be concluded the that City's conduct during bargaining constituted any indicia of bad faith bargaining. As stated in the Warning Letter, it appears that the City drove a hard bargain. During negotiations the City refused to accept the proposals passed by the GCEA because these proposals, as alleged by the City during bargaining, did not achieve the long term structural changes. Specifically, the City emphasized a need to address three main issues given the City's financial condition: (1) to establish a two-tier retirement system; (2) medical cost sharing; and (3) PERS cost-sharing. The increasing PERS rates was only one of three major items that the parties were unable to agree upon. During negotiations, the City expressed concerns about increasing PERS rates, and its need for cost savings. Facts also show that the City explained the reasons for its proposals, including the need to be able to fund future retirements and maintain the City's retirement system. Charging Party does not allege any facts showing that the City's financial concerns were not legitimate. Moreover, facts in the record show that the City considered alternatives from GCEA that would allow it to achieve its goal of obtaining long-term structural changes to compensation and retirement. Accordingly, under the "totality of the conduct" test, the amended charge fails to allege facts showing that the City engaged in surface bargaining.

II. Negotiating to Impasse a Permissive Subject

Although not clear from the amended charge, it appears Charging Party is alleging that by bargaining to amend the cost-sharing agreement in Article 2, Section E of the MOU—thus, requiring employees to pay an additional 1.5% of the employer PERS rates—the City negotiated to impasse a permissive subject of bargaining.

The City and GCEA have a bilateral obligation to engage in meeting and conferring about mandatory subjects of negotiations that relate to wages, hours of employment and other terms and conditions of employment. (Gov. Code § 3505).) However, the parties are free to negotiate over the inclusion of non-mandatory subjects of bargaining. (*San Mateo County Community College District* (1993) PERB Decision No. 1030; *Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*); *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*).) A party may not, however, legally insist upon the acceptance of such proposals "in the face of a clear and express refusal by the union to bargain" over them. (*Lake Elsinore*.) Thus, the insistence to impasse on non-mandatory subjects of bargaining is a per se unfair practice. (*Travis Unified School District* (1992) PERB

Decision No. 917 (*Travis*); *Chula Vista*; *Lake Elsinore*; *Modesto City Schools* (1983) PERB Decision No. 291; *Ross School District Board of Trustees* (1978) PERB Decision No. 48.) Applying this rule, PERB has held that an employer may not insist to impasse that a union waive statutory rights, such as the right to file grievances in its own name. (*Travis*; *Chula Vista*.)

In *San Mateo*, *supra*, PERB Decision No. 1030, the Board articulated the *Lake Elsinore*, *supra*, PERB Decision No. 603 rule as follows:

> Under *Lake Elsinore*, the Board held that parties may engage in negotiations dealing with permissive, nonmandatory subjects of bargaining, but once a party subsequently decides to take a position that the nonmandatory subject not be included in the collective bargaining agreement, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining.

In *Chula Vista*, *supra*, PERB Decision No. 834 the Board stated:

> ...while the parties may engage in negotiations over proposals dealing with permissive, nonmandatory subjects of bargaining, when one party subsequently decides to take the position that the nonmandatory proposal not be included in the contract, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining.

(Citations omitted.)

In *Travis*, *supra*, PERB Decision No. 917, the school district insisted to impasse on maintaining a contract provision that limited the union's right to file grievances on its own behalf, a subject that had been determined to be non-mandatory in *Chula Vista*, *supra*, PERB Decision No. 834 and *South Bay Union School District* (1990) PERB Decision No. 791. The union rejected the employer's proposal to maintain the status quo and continued to insist on its own proposal to modify the contract provision so as not to waive its statutory rights. Finding the facts of this case to be very similar to those of *Chula Vista*, the Board found that the union's continued refusal to waive its statutory rights, while at the same time continuing to press for inclusion of its proposal, "ma[d]e clear its contention that it was improper for the district to insist on language which it believed deprived it of its statutory rights."

In *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S, the Board noted that consistent with the standards set forth in *San Mateo*, *supra*, PERB Decision No. 1030, *Lake Elsinore*, *supra*, PERB Decision No. 603, *Chula Vista*, *supra*, PERB Decision No. 834 and *Travis*, *supra*, PERB Decision No. 917, a showing must be made

that the party objecting to the inclusion of the non-mandatory subject clearly communicated its opposition to further consideration of the proposal.

Here, even if the cost sharing agreement in Article II, Section E of the MOU is a permissive subject of bargaining, there are no facts in the current record to show that GCEA raised any objection to the City's request to modify the cost-sharing provision, or that it refused to negotiate that provision. (See *NLRB v. Wooster Division of Borg-Warner Corp.* (1958) 346 U.S. 342, 349 [as to permissive subject of bargaining, "each party is free to bargain or not to bargain, and to agree or not to agree"].) Further, facts in the record show that on August 18, 2010, GCEA responded with its own counterproposals on the cost sharing issue, and that the parties continued to discuss modifying the cost sharing arrangement throughout negotiations. Accordingly, since the charge is devoid of any facts showing that the GCEA clearly communicated its opposition to negotiate what GCEA believed to be a non-mandatory subject of bargaining, the charge fails to demonstrate a prima facie case that City *per se* violated the duty to bargain in good faith.

Additionally, the City did not insist to impasse the modification of the cost-sharing agreement. Prior to declaring impasse, the City presented GCEA with proposals that provided for a salary reduction in lieu of its proposal to modify the parties PERS cost sharing agreement. Further, the City's efforts to negotiate regarding modifications to the PERS cost-sharing provision does not *per se* demonstrate bad faith bargaining. In *Eureka City School District* (1992) PERB Decision No. 955 (*Eureka*), the Board stated, in pertinent part:

> . . . once agreement is reached concerning a permissive subject and it is embodies in the parties' [MOU], the parties are bound by the terms of the agreement until its expiration *or unless modified by the parties*. (Italics added.)

Consistent with *Eureka*, even though the parties previously agreed to a cost-sharing arrangement, there was nothing to preclude to City from seeking to negotiate modifications to that arrangement.

Therefore, the amended charge fails to demonstrate the City violated its duty to bargain in good faith.

Conclusion

For the reasons set forth above, as well as in the May 26, 2011 Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Adrianna E. Guzman

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 26, 2011

Jeffrey Natke, Labor Representative
City Employees Associates
2918 E. 7th Street
Long Beach, CA 90804

Re: *Glendale City Employees Association v. City of Glendale*
Unfair Practice Charge No. LA-CE-672-M
WARNING LETTER

Dear Mr. Natke:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 14, 2011. The Glendale City Employees Association (GCEA or Charging Party) alleges that the City of Glendale (City or Respondent) violated section 3505 of the Meyers-Milias-Brown Act (MMBA or Act) and PERB Regulation 32603 by engaging in surface bargaining.[1]

Investigation of the charge revealed the following relevant information. GCEA is the exclusive representative of a City bargaining unit covering non-sworn miscellaneous employees. GCEA and the City are parties to a memorandum of understanding (MOU) that expired on June 30, 2010.

Relevant MOU Provisions

MOU Article Ten, Section VI provides:

> VI. **RESOLUTION OF IMPASSE**
>
> Should impasse be reached regarding the negotiation of a successor [MOU] to this [MOU], the City and [GCEA] shall meet and confer to establish an impasse procedure to resolve the disagreement.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Facts as Alleged[2]

Between March 2010 and September 2010, the parties held nine negotiations sessions and exchanged proposals and counter-proposals for a successor MOU.

At the first bargaining session (March 11, 2010), the parties discussed, among other things, the City's budget, retirement costs under the Public Employees' Retirement System (PERS), and cost-saving ideas.

During an April 29, 2010 meeting, the City wanted to discuss PERS cost sharing as an alternative to layoffs. The City's Director of Human Resources Matt Doyle expressed that there was public sentiment regarding retirement costs, and noted that a two-tier retirement system was a "huge issue" for the City Council. He also noted that while a two-tier retirement system would not solve the immediate budget issue, it would make a difference long-term. The City proposed that the employees pay 100% of the cost for medical insurance premium increases. GCEA rejected that proposal, and told the City that it was "asking for way too much." GCEA proposed furloughs as an alternative, however the City stated it opposed cutting services.

During a May 21, 2010 meeting, the City made its initial one-year proposal, which included the following terms: (1) no pay adjustments; (2) no additional three lower steps on the salary range for each classification; (3) employees pay 100% of all medical insurance premium increases; (4) 2% at 60 retirement for new hires; and (5) employees to pay 1.5% of the City's PERS contribution. The parties also discussed GCEA's proposals. The City advised GCEA that it would present GCEA's proposals to the City Council, and the City would have to "cost out" GCEA's proposal.

During this meeting, GCEA's chief negotiator, Wendell Phillips, requested that the City provide GCEA with the following information: (1) the projected savings the City expected to achieve through its proposals, and (2) the equivalent dollar amount of 1% of its members' salaries. Mr. Doyle informed GCEA that "Police and Fire have contracts in place" and that GCEA was going to have to accept "the reality that public safety will always be the highest priority to the general public and that the public does not want to see cuts to Police and Fire." The charge does not allege facts showing that GCEA made a follow-up request.

At the June 2, 2010 meeting, Mr. Phillips questioned the City about a "secret" tentative agreement reached with the City's police unit. Mr. Doyle advised Mr. Phillips that while the City had reached a tentative agreement, it was not a foregone conclusion, and there were still language issues to be worked out. As such, it was not yet a public record. Mr. Phillips advised

[2] The Board agent may rely on a respondent's factual allegations that are undisputed or not refuted by the charging party. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

the City that because GCEA members did not know the terms of the tentative agreement with the police, it would be difficult for talks to progress with GCEA.

Mr. Doyle advised GCEA that the City Council was "expecting some degree of sacrifice from employees," and that the City needed to see movement from GCEA. While Mr. Doyle acknowledged that the City was not in as bad shape as some other agencies, he also noted that "all cities are facing very difficult times." GCEA again raised the issue of furloughs, and Mr. Doyle again reiterated the City's opposition by noting that furloughs do not "solve anything, . . . hurt employees, and are at best a temporary fix." GCEA also noted that although the City said it wanted to be fair, police and fire units were not being treated the same as other units. GCEA also suggested that the "City's decision to take the negotiations to the Glendale press [on or about June 2, 2010] was problematic. . . and detrimental to the negotiation process."

During this meeting, Mr. Doyle also provided GCEA with the information Mr. Phillips had requested on May 21, 2010. As to the issue of cost savings, Mr. Doyle provided GCEA with the information requested, but also explained that, "a number of items were hard to cost or the cost savings were unknown." As for the issue of the dollar amount of 1% of GCEA salary, Mr. Doyle identified the amount to be $688,785. GCEA did not repeat its May 21 request for the information or seek clarification of the City's response.

On July 1, 2010, the parties met again for negotiations. The City informed GCEA that, although the fire unit still had a contract in place, the fire unit had agreed to: (1) defer a cost-of-living adjustment (COLA) to 2013; (2) contribute an additional 0.5% for PERS costs (which brought them to 2%); and (3) implemented a lower retirement tier for new hires (3% at 55—down from 3% at 50). When CGEA asked whether the police unit was still getting its 6% COLA, the City replied that the police unit has a contract in place. GCEA made a comment that GCEA had a cost sharing in place until 2016 and that "it doesn't seem to 'stick' like it does" with the police and fire units. GCEA advised that while it could accept an undefined lower-retirement formula for new hires, an 80/20 split on cost-sharing for medical (provided all units had the same percentage), and adding three lower steps to the salary range if the merit step was converted to a regular step, it was unlikely it could get the votes needed to ratify the contract, if police, fire, and the management units were not willing to agree to similar cuts.

During this meeting, Mr. Doyle presented GCEA with the City's second package proposal. Mr. Doyle explained that, for this proposal, GCEA would have to move some on the big three items: (1) PERS cost sharing; (2) medical costs sharing; and (3) implementation of a two-tier system.

GCEA perceived the City's proposal as "the same as its initial offer on all material terms." GCEA then provided the City with a counter-proposal that included the following terms: (1) an undefined lower retirement formula for new-hires; (2) an 80/20 split on cost-sharing for medical (provided all units had the same percentage); (3) adding three lower steps to the salary range; and (4) increasing PERS cost-sharing to 0.75%.

Mr. Doyle advised GCEA that while he and the City appreciated the movement on PERS cost sharing, it seemed that negotiations were "getting to the point where there is no process being made on either side."

During the July 7, 2010 meeting, Mr. Phillips was not able to attend. The City presented a third proposal which included a 70/30 or 60/40 medical cost sharing arrangement (versus the 80/20 arrangement GCEA proposed). The City also proposed a one-year contract, as opposed to GCEA's proposed three-year contract. The City explained its position by referencing the uncertainty as to "where things are headed in the future." The City, however, did not change its position on PERS cost sharing, two-tier retirement, and medical cost-sharing.

At the July 13, 2010 negotiation session, GCEA offered a one-year package proposal that contained the following terms: (1) employee would pick up 25% of medical increases; (2) two-tier formula of 2% at 55; (3) employee contribution of 0.25% of the City's PERS contribution; (4) adding three lower steps to the salary range; (5) the willingness to work jointly on non-economic items; and (6) MOU "clean-up." Mr. Doyle expressed that the City needed additional concessions from GCEA.

During the July 19, 2010 bargaining session, the City presented GCEA with its fourth proposal which included the following terms:

1. Employees pay 75% of medical premium increases (an improvement over prior proposal that called for employees paying 100%);

2. 2% at 55 retirement tier for new hires (an improvement over prior proposal of 2% at 60), provided that GCEA agree to the "average of the three highest years" calculation method for new hires, as opposed to the single highest year; and

3. "increase current cost sharing provisions for the employer position of the PERS contribution from 0.5% to 2.0%; OR, IN THE ALTERNATIVE, a 1.5% base salary decrease."

GCEA agreed to take the proposal to its members for a vote.

During the August 18, 2010 bargaining session, GCEA presented the City with a one-year counter-proposal, that included the following terms: (1) employees pay 50% of medical increases (instead of the City's proposed 75%); (2) 2% at 55 at single highest year (instead of the City's proposed 2% at 55 with calculation method of three highest years); (3) employees pay .75% of the City's portion of PERS (instead of City's proposed 2%); (4) adding three lower steps to salary range; (5) willingness to work jointly on non-economic items and MOU "clean-up"; (6) changes to boot allowance [charge does not specify]; (7) reduce floating holiday allowance by 16 hours; (8) memorializing language on a salary tie [charge does not specify]; (9) revising language on acting assignments [charge does not specify]; (10) addition of a "maintenance of benefits" clause (i.e., no additional cuts to benefits, layoffs, furloughs, or reduced work hours); (11) providing certification pay for waste-water employees [charge does

not specify amount]; (12) providing fiber optic pay [charge does not specify amount]; and (13) converting merit step to step 9 on salary range. GCEA's proposal also included terms that reflected the parties' tentative agreement on certain items. No agreement was reached during this meeting.

The parties had agreed to meet for bargaining on August 25, 2010. Shortly before the meeting, Mr. Phillips informed Mr. Doyle in an e-mail message that he was canceling the meeting and that he did not want GCEA to meet with the City without him. Mr. Phillips also stated that he would inform the City of another date for meeting. One hour later, Mr. Doyle responded by e-mail with the City's "Conditional Last, Best Final Meet and Confer Proposal" (Conditional LBFO) which proposes the following:

1. **Term:** One Year

2. **Salary Adjustment:** 0%

3. **Salary Step:** Restructure salary step structure to increase number of steps from current six to nine steps. Add three lower steps to beginning of salary range for each represented unit classification; leave remaining six steps, including Merit (M) step intact.

4. **Standby Pay:** Incorporate standby pay provision for non-designated unit classifications, as per side letter agreement of 1/19/10.

5. **Medical Insurance:** Employee to pay 50% of the increase in medical insurance premiums that took effect 6/1/10, starting 7/1/10.

6. **PERS Retirement:** Implement 2nd tier retirement of 2% at 55, with the three average highest years, for all new hires after January 1, 2011.

7. **PERS Retirement Cost Sharing:** Increase current cost-sharing provisions for the employer portion of the PERS contribution from 0.5% to 2.0%. In the event that this Last, Best and Final proposal does not result in a ratified agreement, the City shall seek implementation of a 1.5% base salary decrease in lieu of the increased PERS cost-sharing, and this alternate proposal shall be considered incorporated into the City's written proposal of July 19, 2010.

8. **Acting Assignment:** Assigned after five (5) consecutive calendar days.

9. **Uniform Allowance/Forensics:** Adjust uniform allowance to the same level Community Service Officers.

10. **Overtime Definition/Communications & Jail:** Adjust rate of overtime for hours worked between 161 and 168 . . .

11. **Uniform/Boot Allowance:** Eliminate boot allowance. Agree to provide one pair of working boots. . . to all employees in all classifications currently covered by the MOU and those additional classifications as proposed in the GCEA proposal, on annual basis.

12. **Non-Economic Items:** Work jointly with GCEA on non-economic operational items.

13. "**Clean-Up" Language:** Work jointly with GCEA on other non-economic "clean-up" language items throughout the written MOU.

14. **GCEA Proposals:** The City proposes to expand not greater than $175,000 per fiscal year in funding any or all of the following GCEA-proposals made by GCEA on August 18, 2010:

a) Certification Pay—Wastewater Unit
b) Fiber Optic Pay—GWP Stations Maintenance Unit
c) Salary Tie—GWP Stations Maintenance Unit

The City shall maintain a record of. . . .

15. **Impasse Procedures:** In the event that this Conditional Last, Best and Final Offer does not result in a ratified agreement, the parties shall be at impasse. MOU Article Ten, Section VI, provides that should impasse be reached regarding the negotiation of a successor agreement, the City and the [GCEA] shall meet and confer to establish an impasse procedure to resolve the disagreement. Therefore, and as an excess of caution, the City proposed that any necessary impasse process be confined to submission of the dispute directly to the City Council for its resolution.

16. **Duration of Time to Enter into Agreement:** This Conditional Last, Best and Final Offer shall remain valid through and including August 31, 2010. . . . In the event that this Conditional Last, Best and Final Offer is either not ratified by the [GCEA] or if timely ratification notice is not provided, the

> Conditional Last, Best and Final Offer shall be concurrently amended by reversion to the written City proposal dated July 19, 2010, which shall itself become the Last, Best and Final City Offer.

Mr. Doyle's e-mail message explained that the proposal was "'conditional' in that the City's July 19, 2010 written proposal shall automatically become the City's Last, Best and Final proposal if the August 25, 2010 attachment is not timely ratified." On that day (August 25, 2010), GCEA's membership rejected the City's July 19, 2010 proposal.

On August 26, 2010, GCEA confirmed receipt of the City's Conditional LBFO and advised the City that such proposal would be presented to the GCEA membership for vote.

On September 17, 2010, GCEA informed the City that GCEA rejected the August 25, 2010 proposal.

On September 21, 2010, the City declared impasse. Mr. Doyle reminded GCEA that, as previously stated, the City's July 19, 2010 proposal would be subject to the impasse procedures. Mr. Doyle also advised that, given the MOU language which required the parties to meet and confer regarding an impasse procedure, the City's proposal was that the impasse procedure consist only of submission of the issue to the City Council for resolution.

The parties met on October 6, 2010 to discuss impasse resolution procedures. GCEA presented a comprehensive written proposal, containing concessions, for consideration by a mediator. Mr. Phillips informed the City's representative that he could "guarantee" $1 million in concessions if considered through the mediation process. The City representative responded that although there is no change in the City's position that an impasse exists, if GCEA could provide a mediation-related proposal, the City would review it to determine if the proposal alters the City's position that the impasse is not subject to mediation.

On October 7, 2010, GCEA provided the City with a "Mediation Proposal for a Successor MOU 2010 Through 6/30/12." The City reviewed the proposal, but ultimately rejected it since that proposal did not modify the City's position that the impasse dispute should be next submitted to the City Council for resolution. In an October 18, 2010 e-mail message to Mr. Phillips, Mr. Doyle states that the GCEA's mediation proposal "does nothing to address the systematic compensation issues which must be resolved in order to minimize the ongoing, long term economic difficulties being experienced by the City." The parties remained at impasse on defining impasse resolution procedures. No additional meetings were scheduled for discussing the impasse resolution procedures.

On October 26, 2010, Mr. Doyle sent Mr. Phillips an e-mail message informing him that, on November 2, 2010, the City would be advising the City Council that the parties were at impasse as to the successor MOU, and at impasse on selecting impasse procedures. Mr. Doyle also advised Mr. Phillips that the City would be recommending that the City Council adopt and implement the City's July 19, 2010, last, best and final offer, with a continuance of the current

MOU provision for a 50/50 split of medical premium increases. Mr. Phillips confirmed that he would be at that City Council meeting.

On November 2, 2010, the City Council passed a resolution that the parties' impasse regarding the type of impasse procedure to employ was resolved by the City Council which determined that the impasse should be resolved and addressed solely by the City Council. In that same resolution, the City Council also resolved the parties' meet and confer impasse for a successor agreement by implementing terms from the City's last, best, and final offer effective immediately. The City Council's resolution also modified the July 19, 2010 proposal regarding medical insurance contributions to provide that employees pay 50% of medical insurance premiums. The July 19, 2010 proposal originally required that employees pay 75% of the premium.

DISCUSSION

Although not clearly stated, it appears the Charging Party is alleging that the City violated MMBA section 3505 and PERB Regulation 32603(c) and (e)[3] by engaging in bad faith or "surface" bargaining. For conduct that occurs prior to the impasse phase, PERB Regulation 32603(c) is at issue. The MOU contains procedures for determining the impasse resolution procedure when impasse is reached. As such, for conduct occurring during and prior to the exhaustion of the City's impasse procedures, PERB Regulation 32603(e) is at issue. However, conduct within that time-frame cannot also be the basis for a violation of PERB Regulation 32603(c). (See, e.g., *Moreno Valley Unified School District v. Public Employment Relations Board* (1983) 142 Cal.App.3d 191 [holding that a violation of Educational Employment Relations Act section 3543.5(c) cannot be based on conduct occurring during impasse procedures].) As described in the corresponding heading below, this letter will address alleged bad faith bargaining conduct occurring both during and before the impasse phase.

PERB uses the same bad faith bargaining analysis for violations of either PERB Regulation 32603(c) or (e). (See, e.g., *Ventura County Community College District* (1998) PERB

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[3] PERB Regulation 32603 states, in relevant part:

> It shall be an unfair practice for a public agency to do any of the following:
>
> (c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.
>
> (e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.

Decision No. 1264.) Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*Placentia Fire Fighters*).) PERB has held it is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275; *Placentia Fire Fighters*, at p. 25.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District* (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District*, *supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

Additionally, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

I. Conduct Occurring Prior to Impasse Phase

It appears Charging Party is alleging that the City engaged in surface bargaining in violation of MMBA section 3505 and PERB Regulation 32603(c) by engaging in: (1) hard bargaining; and (2) regressive bargaining. As discussed in the corresponding headings, the charge fails to demonstrate that the City engaged in surface bargaining prior to reaching an impasse.[4]

A. Hard Bargaining

Although not clear from the charge, it appears Charging Party is alleging that the City engaged in surface bargaining by repeatedly rejecting GCEA's cost-cutting proposals (e.g., early retirement incentive and work furloughs). There are no facts in the record to show that the City refused to negotiate about any matter within the scope of representation. During bargaining, the City emphasized the need to establish a two-tier retirement system, and have employees contribute more towards PERS and medical benefit premiums. The City also pointed out that it needed to make long term structural changes. The charge further admits that GCEA recognized the "financial condition of the City and of the economy generally." The City's insistence that employees pay more towards their retirement appears to be hard bargaining. Accordingly, it appears the City's refusal to agree to proposals relating to cost-cutting demonstrates an adamant position during bargaining. (*Placentia Fire Fighters*, *supra*, 57 Cal.App.3d 9, 25; *Oakland Unified School District*, *supra*, PERB Decision No. 275.)

When a party preemptively announces it will not deviate from a position under any circumstances, bad faith may be inferred. (*Regents of the University of California* (1983) PERB Decision No. 365-H at pp. 21-22.) However, this is not what happened here. Although the City espoused a hard line, it appears that such a position was not etched in stone. Facts in the record show that the City met with GCEA at least nine times from March 2010 through

[4] PERB has defined impasse in the following terms: "[I]mpasse exists where the parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124, p. 5.) PERB's analysis has focused on a number of objective factors, including the number and length of negotiating sessions, the extent to which the parties have made and discussed counter-proposals to each other, the number of tentative agreements, and the number of unresolved issues. (Cal. Code of Regs., tit. 8, sec. 32793(c); but see *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 19 [good faith negotiating considered].) In this case, it appears that impasse over a successor MOU was reached on or about September 2010 after nine bargaining sessions. At that time, there was substantial disagreement on core economic issues, centered around salary reductions in lieu of PERS cost-sharing. No further proposals or counterproposals for a successor MOU were made after GCEA rejected the City's August 25, 2010 Conditional LBFO, and at the next bargaining session (October 6, 2010), the parties negotiated over impasse resolution procedures. Accordingly, it appears that proposals for a successor MOU concluded in September 2010 and that the parties were at impasse.

September 2010, presented GCEA with four proposals, reached tentative agreement on some items, and made some improvement in subsequent proposals. For example the July 19, 2010 proposal improved the employee medical premium increase from 100% to 75% and improved the retirement formula for new hires from 2% at 60 to 2% at 55. Further, the City modified its position regarding the medical premium increase from 75% to 50% with its November 2, 2010 implementation of its last, best, and final offer. Accordingly, the charge fails to demonstrate that the City did not have a subjective intent to reach an agreement.

B. Regressive Bargaining

Regressive bargaining is one indicia of surface bargaining. (*Chino Valley Unified School District* (1999) PERB Decision No. 1326 [by reneging on tentative agreements, employer engaged in regressive bargaining techniques, which is one indicator of bad faith bargaining].) The charge alleges that the City regressed from its August 25, 2010 Conditional LBFO by implementing the July 19, 2010 proposal on November 2, 2010. The August 25, 2010 Conditional LBFO contains proposals for caps on "Certification Pay[,] Fiber Optic Pay[, and] Salary Tie Pay" which "benefited GCEA." The July 19, 2010 proposal did not include such benefits.[5] Arguably, the August 25, 2010 Conditional LBFO included better terms than the July 19, 2010 proposal. However, the presence of one indicia alone will not establish bad faith bargaining. (*Oakland Unified School District* (1996) PERB Decision No. 1156.)

For these reasons, the charge fails to state a prima facie case that the City engaged in surface bargaining under MMBA section 3505 and PERB Regulation 32603(c).

II. Conduct Occurring During and Before The Exhaustion of the City's Impasse Procedures

Although not clear from the charge, it appears Charging Party is alleging that the City engaged in surface bargaining during bargaining for the impasse resolution procedures.

To determine whether a party has alleged sufficient facts to state a prima facie case that a party to negotiations failed to participate in impasse procedures in good faith, PERB examines alleged indicia of bad faith in the context of the totality of the parties' post-impasse conduct. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M; *Newark Unified School District* (2007) PERB Decision No. 1895; *City of Fresno v. People Ex Rel. Fresno Firefighters* (1999) 71 Cal.App.4th 82; PERB Reg. 32603(e).)

Facts in the record show that the parties met on October 6, 2010 to negotiate over the impasse resolution procedure pursuant to MOU Article Ten, Section VI which requires the parties to

[5] Not all of the provisions implemented on November 2, 2010 were less beneficial to GCEA. Although the medical insurance proposal in the July 19, 2010 provided that employees pay 75% of the increase in medical insurance premiums, the City modified that proposal to provide that employees pay 50% of any premium increase. This modification was the same proposal made with the City's August 25, 2010 Conditional LBFO.

"establish an impasse procedure" when impasse is reached for a successor MOU. There is no dispute that during the impasse meet and confer session, the City proposed that the dispute be submitted directly to the City Council for resolution. When GCEA requested mediation, the City explained why it did not see mediation as a useful means to resolve the parties' impasse. The City, after considering GCEA's mediation proposal, determined on October 18, 2010 that GCEA's proposal did "nothing to address the systematic compensation issues which must be resolved in order to minimize the ongoing, long term economic difficulties being experienced by the City." On that basis, the City rejected GCEA's proposal for mediation as an impasse mediation resolution procedure. No new proposals for impasse resolution were made by either side and the parties were at impasse as to the process to be used to resolve the impasse.

The facts alleged in the charge concern the City's failure to compromise its position on the impasse resolution process. As previously stated, adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Oakland Unified School District*, *supra*, PERB Decision No. 275.) Nothing in the charge establishes that the City's maintenance of its positions on the impasse resolution process is evidence of bad faith bargaining. Additionally, there are no facts to demonstrate that the City failed to follow the procedures set forth in MOU Article Ten, Section VI. Accordingly, under the totality of the conduct test, GCEA has failed to allege sufficient facts to state a prima facie case that the City engaged in surface bargaining during and prior to the exhaustion of the impasse phase.

Although not clear from the charge, it appears Charging Party is also alleging that the City engaged in surface bargaining by refusing to engage in impasse mediation proceedings. However, these facts, even if accepted as true fail to show that the City violated MMBA. The MMBA merely provides that if after a reasonable period of time the public agency and employee organization fail to reach an agreement, the parties may agree to appoint a mediator. (Gov. Code, § 3505.2.) Accordingly, since mediation under the MMBA is strictly voluntary, the City was under no obligation to participate in such a process for resolving the impasse. (*Ibid.*)

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[6] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended

[6] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before June 9, 2011,[7] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

YP

[7] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)